Peter ak Merupi @ Mansor bin Abdullah & Anor v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-05–117 OF 2007
LOW HOP BING, SYED AHMAD HELMY AND APANDI ALI JJCA
6 OCTOBER 2010

Criminal Law — Penal Code — s 300 — Murder — Appeal against conviction and sentence — Victim assaulted with stick — Whether nature of injury showed intention to cause bodily injury sufficient in ordinary course of nature to cause death — Weapon used by first appellant recovered from second appellant's house — Whether common intention proven — Defence of bare denials — Whether prosecution's case proven beyond reasonable doubt

On the evening of 16 November 2004 Mazlan bin Sapiee ('the deceased') and his girlfriend ('PW4') had gone to the vicinity of the Sarawak State Library, a hilly terrain with shady trees. At that place PW4 was assaulted by a man and was robbed of her ring. The assailant also stripped her and attempted to rape her. PW4 struggled and tried to wrestle away a stick that was in the hands of the assailant. The assailant then escaped on a motorcycle. PW4 sought help from a friend who was passing by and was taken to the hospital. The deceased's father ('PW2') who was informed of the incident went to look for the deceased at the vicinity of the state library and found the deceased there, dead. The post mortem showed that the cause of death was bilateral subdural and subarachnoid haemorrhage with fracture of skull due to blunt object. At the identification parade, PW4 identified the first appellant as the assailant. PW4 also identified a stick ('exh P34A') as the one used by her assailant. The stick was recovered from the second appellant's house, in the presence of the two appellants. At the end of the case for the prosecution, the learned trial judge found that a prima facie case had been made out against both appellants. The first appellant testified that on that day, he together with one Edwin and the second appellant had gone to the vicinity of the state library. The first appellant claimed that it was the second appellant who had assaulted the deceased with the stick. The second appellant however denied being together with the first appellant on the day of the incident. He could not give any reason as to why the first appellant was accusing him of assaulting the deceased. He admitted that the stick was his, and that it was recovered from his house. The appellants were jointly charged with murder under s 302 read with s 34 of the Penal Code ('Code'). Both of them were found guilty and convicted and sentenced to death by the High Court. Hence this appeal.

Held, dismissing the appeal:

(1) The finding of fact made by the trial judge turned solely on the credibility

of witnesses. It is trite law that an appellate court should be very slow in disturbing the findings of the trial judge. Evaluation of the evidence showed that the appellants had jointly committed the offence of murder (see paras 20–21).

(2) Any assailant, who assaulted the victim with a blunt object like the stick at the back of the head, must have had the intention to cause bodily injury to that victim. And when the assault was done with such a great force that caused fracture of the skull, surely it was done with the knowledge and intention to cause, such a bodily injury that is sufficient in the ordinary course of nature to cause death. Alternatively the assailant knew that such an act (of hitting at the back of the head) was imminently dangerous that it must in all probability cause death or such bodily injury as was likely to cause death and it was done without any excuse. Any human being is aware that the neck and head area is a vulnerable part of the body and that any injury to that part of the body would be fatal. The injuries suffered by the deceased and the manner the injuries were caused fell within the third and fourth limbs of s 300 of the Code (see paras 23–25).

(3) Common intention was proved by the fact that the weapon used in the commission of the murder (the stick) was the very one identified by PW4 and subsequently by the first appellant; and it was recovered from the house of the second appellant (see para 26).

(4) The defence by both appellants were bare denials. Such denials when tested with the evidence as a whole and without any other proof were insufficient to raise any reasonable doubt upon the prosecution's case. Instead of casting any reasonable doubt, the first appellant's story of blaming the second appellant for the crime, further cemented the prosecution's case. The prosecution had proven it's case beyond reasonable doubt (see para 27).

[Bahasa Malaysia summary

Pada petang 16 November 2004 Mazlan bin Sapiee ('si mati') dan teman wanitanya ('PW4') telah masuk ke kawasan Perpustakaan Negeri Sarawak, di kawasan berbukit dengan pokok-pokok besar. Di sana PW4 telah diserang oleh seorang lelaki dan cincinnya telah dicuri. Penyerang juga telah membogelkannya dan cuba merogolnya. PW4 telah bergelut dan cuba melawan dengan kayu di tangan penyerang. Penyerang kemudian melarikan diri dengan motorsikal. PW4 meminta bantuan seorang kawan yang lalu lalang di situ dan telah dibawa ke hospital. Bapa si mati ('PW2') yang telah diberitahu tentang kejadian itu telah pergi mencari si mati di kawasan perpustakaan negeri dan telah menjumpai si mati di sana, mati. Post mortem menunjukkan sebab kematian adalah kerana pendarahan subdural dan subarachnoid dengan keretakan otak akibat objek tumpul. Di barisan pengecaman, PW4 mengecam

perayu pertama sebagai penyerang. PW4 juga pengecam kayu ('eksh P34A') sebagai kayu yang digunakan oleh penyerangnya. Kayu itu ditemui di rumah perayu kedua, dengan kehadiran kedua-dua perayu. Di akhir kes pendakwaan, hakim perbicaraan yang bijaksana mendapati bahawa satu kes prima facie telah dibuat terhadap kedua-dua perayu. Perayu pertama telah memberi keterangan bahawa pada hari tersebut, dia bersama Edwin dan perayu kedua telah ke kawasan perpustakaan negeri. Perayu pertama mendakwa bahawa perayu kedua yang telah menyerang si mati dengan kayu. Perayu kedua bagaimanapun telah menafikan dia bersama perayu pertama pada hari kejadian. Dia tidak dapat memberi sebab kenapa perayu pertama menuduhnya penyerang si mati. Dia mengakui bahawa kayu itu miliknya, dan bahawa ia telah ditemui di rumahnya. Perayu-perayu telah dituduh bersama kerana membunuh di bawah s 302 dibaca dengan s 34 Kanun Keseksaan ('Kanun'). Kedua-dua mereka didapati bersalah dan disabit dan dijatuhkan hukuman mati oleh Mahkamah Tinggi. Justeru itu rayuan ini.

Diputuskan, menolak rayuan:

(1) Penemuan fakta yang dibuat oleh hakim perbicaraan hanya bertumpukan kebolehpercayaan saksi-saksi. Adalah undang-undang tetap bahawa mahkamah rayuan patut kurang campur tangan dengan penemuan hakim perbicaraan. Penelitian keterangan menunjukkan bahawa perayu-perayu secara bersama melakukan kesalahan membunuh (lihat perenggan 20–21).

(2) Mana-mana penyerang, yang telah menyerang mangsa dengan objek tumpul seperti kayu di belakang kepala pasti mempunyai niat untuk menyebabkan kecederaan pada badan terhadap mangsa tersebut. Dan apabila serangan itu dilakukan dengan kuat sehingga menyebabkan keretakan otak, pasti ia dilakukan dengan pengetahuan dan niat untuk menyebabkan kecederaan pada badan bahawa ia mencukupi dalam keadaan biasa menyebabkan kematian. Secara alternatif penyerang mengetahui bahawa tindakan sedemikian (memukul di belakang kepala) amat berbahaya sehingga ia pasti dalam semua kebarangkalian menyebabkan kematian atau kecederaan pada badan yang berkemungkinan menyebabkan kematian dan ia telah dilakukan tanpa apa-apa alasan. Mana-mana manusia sedar bahawa bahagian tengkuk dan kepala adalah bahagian badan yang mudah terdedah kepada bahaya dan bahawa kecederaan kepada bahagian badan tersebut boleh membawa mudarat. Kecederaan yang dialami oleh si mati dan cara kecederaan itu disebabkan jatuh di bawah cabang ketiga dan keempat s 300 Kanun (lihat perenggan 23–25).

(3) Niat bersama telah dibuktikan dengan fakta bahawa senjata yang digunakan dalam pelakuan pembunuhan (kayu itu) adalah yang sama

dikenalpasti oleh PW4 dan berikutan itu oleh perayu pertama, dan ia ditemui dari rumah perayu kedua (lihat perenggan 26).

(4) Pembelaan kedua-dua perayu adalah penafian kosong. Penafian sedemikian apabila diuji dengan keterangan secara keseluruhan dan tanpa apa-apa bukti lain adalah tidak mencukupi untuk menimbulkan apa-apa keraguan munasabah terhadap kes pendakwaan. Sebalik menimbulkan apa-apa keraguan munasabah, cerita perayu pertama yang menyalahkan perayu kedua kerana jenayah itu, telah mengukuhkan kes pendakwaan. Pendakwaan telah membuktikan kesnya melampaui keraguan munasabah (lihat perenggan 27).]

Notes

For cases on s 300 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1656–1678.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Lai Kim Hon & Ors v PP [1981] 1 ML J 84, FC (refd)
Lee Ah Seng & Anor v PP [2007] 6 MLJ 1, FC (refd)
Lee Kwai Heong & Anor v PP [2006] 2 MLJ 528; [2006] 1 CLJ 1043, CA (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 2 AMR 89, CA (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2005] 6 AMR 203, FC (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174 (folld)

Legislation referred to

Criminal Procedure Code ss 180, 182A, 402A
Penal Code ss 34, 300(c), (d), 302
Rules of the Court of Appeal 1994 r 59(2), First Schedule, Forms 5, 6

Appeal from: Criminal Trial No 45–05 of 2005–II (High Court, Kuching).

Wit Malang (Ignatius Melaka Nisau with him) (Wit & Co) for the appellants.
Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Apandi Ali JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellants were jointly charged with murder under s 302 of the Penal Code. Both of them were found guilty and convicted and sentenced to death by the learned judge of the High Court. The charge against them reads as follows:

That you, jointly, with one other still at large, on the 16th day of November, 2004, at about 7:30 p.m. at a spot on the grass verge near the State Library, Petra Jaya, Kuching, in the state of Sarawak, in furtherance of the common intention of you all, committed murder by causing the death of MAZLAN BIN SAPIEE (M), 22 years old, and you thereby committed an offence punishable under section 302 of the Penal Code read with section 34 of the same code.

[2] Dissatisfied with the decision of the High Court, the appellants filed their appeal to this court. The appeal was dismissed on 29 June 2010 whereby the convictions and sentences by the High Court were affirmed. We now give our reasons for our unanimous decision in dismissing the appeal.

THE NOTICE OF APPEAL

[3] Before proceeding with the merits of the appeal, we have to note our observation that the notices of appeal filed by the appellants were actually against sentence only! (refer pp 346–347 of the appeal records). The forms that were used to file the said notices of appeal are the normal Form 5 in the First Schedule of the Rules of the Court of Appeal 1994. We also note that since the two appellants were convicted and sentenced to death, at the material time of filing the notice of appeal, both of them were in prison. Under such circumstances, it would be more appropriate to file such notice of appeal, by using Form 6, as provided for under r 59(2) of the Rules of the Court of Appeal 1994. To our mind, the officer in charge of the prison ought to have explained to both appellants of their rights to appeal against conviction and sentence particularly in cases that carried capital punishment. It is beyond comprehension for any convicted person who has been sentenced with a sole mandatory sentence of death for an offence under s 302 of the Penal Code to be appealing against sentence only. This indeed is an absurd situation.

[4] Bearing in mind that absurdity, of which the appellants may be blameless, we feel that there will be a miscarriage of justice, if we were to apply our minds solely on the issue of sentence. We shall not be blinkered by such technicalities. No doubt it would have been easier for us. But common sense prevailed, and we proceeded to hear the appeals on the basis that they were appeals against conviction and sentence.

FACTS OF THE CASE

[5] The facts of the case as unfolded from the evidence of prosecution witnesses are as follows:

[6] On the late evening of 16 November 2004 Mazlan bin Sapiee ('the deceased'), a young man of 22 years old, went out for on outing with his

girlfriend, Dayang Khairulnisa bt Nasron ('PW4'). It was the third day of Hari Raya and both of them were dressed for the occasion. Prior to that they visited mutual friends and relatives. They went about on a motorcycle ridden by Mazlan. For their outing on that fateful day and time, they went to the vicinity of the Sarawak State Library, a serene place, favoured by joggers for its green and hilly terrain with shady trees.

[7] At that place, Dayang Khairulnisa (PW4) suddenly felt that she was assaulted from behind. She fell and lost her consciousness. Moments later, upon regaining consciousness, she found that she was covered under a heap of leaves. She started looking for Mazlan and found him nearby, also covered under a heap of leaves. As Dayang Khairulnisa (PW4) tried to move Mazlan she was again assaulted. The assailant was a man. The assailant robbed her of her ring and stripped her and carried her on his shoulders to some distance away and upon putting her down on the grass, he tried to rape her. Dayang Khairulnisa resisted the attempts and in the course of the struggle, she tried to wrestle away a stick that was in the hands of the assailant. Due to her persistent resistance, the man then left her and escaped on a motorcycle.

[8] Dayang Khairulnisa then managed to crawl and walk towards the main road, to get help. A woman who saw her walking in an unsteady manner, stopped to help. This woman, Rosmaizah bt Roslan ('PW3') turned out to be Dayang Khairulnisa's friend. Dayang Khairulnisa (PW4) related to Rosmaizah (PW3) what happened to her and her boyfriend. Rosmaizah took Dayang Khairulnisa to the Sarawak General Hospital. And before she was wheeled into the emergency room Dayang Khairulnisa gave Rosmaizah a telephone number for her to contact to inform of the incident.

[9] Rosmaizah then called the number and informed the person at the end of the line as to what had happened to Dayang Khairulnisa and Mazlan. The person at the end of the line is Mazlan's father, Sapiee bin Suip ('PW2'). Upon being so informed of the incident, Sapiee (PW2) quickly lodged a police report vide Gita Report No 5760 04 ('exh P7'). As a concerned father, Sapiee then went to look for his son at the vicinity of the state library. This was about 9.45pm. Upon failing to find him there, he proceeded to the hospital to see Dayang Khairulnisa. After seeing Dayang Khairulnisa, PW2 once again went to look for his son. After searching for about 1/2 hour PW2 found his son, Mazlan. Mazlan was found dead within the grounds of the Sarawak State Library, lying in a position, with his face facing the ground. Sapiee (PW2) then lodged another police report, vide Gita Report No 5761 04 ('exh P8').

[10] The police arrived at the scene of crime, soon after PW2 found the body of his son, Mazlan. The police then cordoned the area and police investigations, led by ASP Bond Lian Min ('PW8') commenced. The body of Mazlan bin

Sapiee was sent to the general hospital for a post mortem. Dr Jamil bin Kolkadir ('PW10') conducted the post mortem on the 18 November 2004. PW10 concluded that the cause of death was *bilateral subdural and subarachnoid haemorrhage with fracture of skull* due to blunt object.

[11] In the course of police investigations, an identification parade was conducted by Insp Fauzan bin Abu Kassim ('PW5'). This was conducted on 3 December 2004, about two weeks after the murder incident. At the identification parade, Dayang Khairulnisa (PW4) identified Peter Merupi ('the first appellant') as the man who assaulted, robbed and tried to rape her on that evening of 16 November 2004 at the vicinity of the Sarawak State Library. In her evidence, PW4 also identified a stick ('exh P34A') as the one that she was struggling with, in her attempts to take it away from her assailant, Peter Merupi (the first appellant). It was revealed that the stick (P34A) was recovered from the house of Zen bin Ali ('the second appellant') in the course of police investigations, on 10 December 2004. The stick was recovered in the presence of the two appellants, when the house was searched by C/Insp Solinient Nyian ('PW9').

FINDINGS AT THE END OF PROSECUTION'S CASE

[12] At the end of the case for the prosecution, the learned trial judge made a ruling that pursuant to the provisions of s 180 of the Criminal Procedure Code a prima facie case has been made out against both appellants on the charge preferred against them and accordingly they were directed to enter their defence.

[13] Upon perusal of the appeal records, including the grounds of judgment, it is clear that the learned trial judge has religiously followed what was required of her pursuant to s 180 of the Criminal Procedure Code. The trial judge had laboured over the evidence adduced by the prosecution and had adopted the correct approach when she referred to and relied on the authorities of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2005] 6 AMR 203; *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 2 AMR 89; and *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85.

[14] The learned trial judge had also correctly identified the essential ingredients of the offence under s 302 of the Penal Code. Having so identified the essential ingredients, the trial judge had analysed all the evidence of the prosecution witnesses. This can be seen from her grounds of judgment (from pp 3–23 of the appeal record).

[15] On the elements of common intention, under s 34 of the Penal Code, the trial judge in evaluating the evidence, had correctly relied on the principles

as enunciated in the Court of Appeal case of *Lee Kwai Heong & Anor v Public Prosecutor* [2006] 2 MLJ 528; [2006] 1 CLJ 1043.

[16] In this case, the second appellant had given a notice of alibi under s 402A of the Criminal Procedure Code. It was dated 30 May 2006, well before the commencement of the trial on 16 June 2006. However the prosecution had successfully demolished such defence, by calling Zaiton bt Bujang ('PW11'). PW11 is the second wife of the second appellant. The trial judge had evaluated the evidence of PW11 and from evidence adduced had rightly dismissed the defence of alibi.

FINDINGS AT THE END OF THE TRIAL

[17] Both appellants elected to give evidence on oath. The first appellant came up with a bizarre story. He testified that on that day, there were three of them who went to the vicinity of the state library. He was accompanied by one Edwin and the second appellant. He told the court that while on a hill within the vicinity of the state library, the second appellant had administered drugs upon himself. After about half hour, the second appellant took out a stick (identified by the first appellant as exh P34A) from his motorcycle and went down the hill. The first appellant and Edwin was then, still on the hill. Both of them then heard a lady's voice calling for help. Both of them went down the hill and saw the second appellant in the act of hitting (assaulting) a man with the stick (exh P34A). The second appellant then ran away and rode on his motorcycle. Both of them, the first appellant and Edwin then followed suit.

[18] The second appellant, in his evidence, denied the story as narrated by the first appellant. He denied being together with the first appellant on the day and time and place of the incident. He could not give any reason as to why the first appellant was accusing him of assaulting the deceased. He admitted that the stick (exh P34A) was his, and that it was recovered from his house.

[19] At the end of the trial, the learned trial judge had followed what was required of her, pursuant to s 182A of the Criminal Procedure Code. She wrote, in her grounds as follows:

> At the close of the defence case, on the totality of the evidence, I find that the first accused and the second accused have failed to raise a reasonable doubt on the prosecution's case and that the prosecution has proved its case against both the accused beyond reasonable doubt. In the circumstances, I find the first accused and the second accused guilty and convict them as charged. I hereby impose the only sentence provided by the law ie sentence the first accused and the second accused to death and they are to be hung by the neck till they are dead.

OUR FINDINGS

[20] Upon perusal of the appeal records and upon hearing submissions by both parties, we find that this case evolved over factual matters. It is also clear that the finding of fact made by the trial judge turned solely on the credibility of witnesses. There is not much of legal issues involved in this appeal. It is trite law that an appellate court should be very slow in disturbing the findings of the trial judge. On this well established principle, it is suffice to cite a few cases such as: *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 ML J 84; *Lee Ah Seng & Anor v Public Prosecutor* [2007] 6 MLJ 1.

[21] However for completeness, we have to state that upon evaluation of the evidence, we also conclude that the appellants had jointly committed the offence of murder. We use the very same words used by Lord Chief Justice (Malaya) Raja Azlan Shah (as he then was) in *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174:

> In the present appeal we think that in view of the nature of the injuries sustained by the deceased and the time and place of the incident, there was evidence of intention on the part of the appellants to cause bodily injury to the deceased.

[22] The cause of death in this appeal, as explained by the pathologist is:

> *Bilateral subdural and subarachnoid haemorrhage with fracture of skull due to blunt object.*

[23] Any assailant, who assaulted the victim with a blunt object (like exh P34A) at the back of the head, must have had the intention to cause bodily injury to that victim. And when the assault was done with such a great force that caused fracture of the skull, surely it was done with the knowledge and intention to cause, such a bodily injury that is sufficient in the ordinary course of nature to cause death. Alternatively the assailant knew that such an act (of hitting at the back of the head) is imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death and it was done without any excuse.

[24] Any human being is aware that the neck and head area is a vulnerable part of the body and that any injury to that part of the body would have been fatal.

[25] The injuries suffered by the deceased and the manner the injuries were caused in this case, fall within the third and fourth limbs of s 300 of the Penal Code.

[26] Last, but not least, common intention has been proved by the fact that the weapon used in the commission of the murder (the stick, exh P34A) was the very one identified by PW4 and subsequently by the first appellant; and it was recovered from the house of the second appellant.

[27] The defence by both appellants has been bare denials. Such denials when tested with the evidence as a whole and without any other proof are insufficient to raise any reasonable doubt upon the prosecution's case. Instead of casting any reasonable doubt, the first appellant's story of blaming the second appellant for the crime, further cemented the prosecution's case.

[28] From the totality of the evidence, we are satisfied that at the end of the trial, the prosecution had proven it's case beyond reasonable doubt. As the finding of the trial court depended on an assessment of the credibility and reliability of the victim witness, it is not the practice of the appeal court to refuse to accept it.

[29] There is therefore no reason for us to disturb the High Court's finding. We have no difficulty in dismissing the appeals by the appellants. The convictions and sentences by the High Court are affirmed.

Appeal dismissed.

Reported by Kanesh Sundrum